DOCUMENT RESUME

ED 156 749 UD 018 336

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TITLE Speech by Drew S. Days, III at the University of Wisconsin Fourth Annual Conference on Equal Employment and Affirmative Action.
INSTITUTION Department of Justice, Washington, D.C. Civil Rights Div.
PUB DATE 27 Apr 78
NOTE 14p.

EDRS PRICE MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS *Affirmative Action; Blacks; Construction Industry; Court Cases; Employment Opportunities; *Employment Practices; *Equal Opportunities (Jobs); *Federal Court Litigation; Government Role; Minority Groups; Police; Quotas; *Racial Discrimination; *Reverse Discrimination; Speeches
IDENTIFIERS Florida (Tampa); Louisiana (Gramercy); Michigan (Detroit); Public Works Employment Act 1977; *Weber v Kaiser Aluminum

ABSTRACT

This speech focuses upon the issues involved in several recent court rulings against affirmative action programs. Among the cases reviewed are "Weber v. Kaiser Aluminum," concerned with the hiring of minority employees at a plant in Gramercy, Louisiana; two cases, in Tampa and Detroit, challenging police department hiring and promotion policies; and the minority business enterprise provision of the Public Works Employment Act of 1977 which calls for a certain percentage of construction industry funds to go to black businesssmen. A number of considerations in these reverse discrimination cases are reviewed, and alternatives are briefly examined. Arguments which support the government's defense of affirmative action programs must be tailored to the specific situations in which they will operate if the goal of equal employment opportunity is to be reached. (GC)

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Department of Justice

SPEECH BY

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AT THE

UNIVERSITY OF WISCONSIN
FOURTH ANNUAL CONFERENCE ON EQUAL EMPLOYMENT AND AFFIRMATIVE ACTION

ON

APRIL 27, 1978

UD018336

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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It is with somewhat mixed emotions that I speak to this, your Fourth Annual Conference on Equal Employment and Affirmative Action. I am pleased, on the one hand, because apparently four years of struggling to correct decades of job discrimination has not turned very many of us around. But, on the other hand, I am saddened to think that this Fourth Conference may lead to the fifth, the sixth, fifteenth, twentieth, and so on, each year serving to remind us of how far we still have to go to bring racial justice to our society. I trust you will understand, therefore, when I say that I hope we won't be meeting like this for many more years.

It is true that we have witnessed a vast social transformation of American life in the past twenty years or so. Blacks are now beginning to take advantage of decent educational and employment opportunities in communities where fifteen years ago registering to vote was out of the question. Yet disadvantaged American Blacks, as well as other minorities, still face an uncertain future in their war against discrimination, poverty, unemployment, poor housing, inadequate education and bad health care. According to the President of the Carnegie Corporation in a report recently released, Blacks still hold most of the dirtiest and the low-level jobs, and on the average make only 59 percent of the earnings of whites despite the gains of the 1960's and the civil rights movement. As evidence of the continued economic inequalities between Blacks and whites, the report mentions several important figures which run counter to the growing perception among many Americans that black advancement has become self-sustaining.

- From 1947 to 1975, the income disparity between Blacks and whites narrowed only 11 percentage points
- The movement of Blacks from lower-paying jobs into higher-paying jobs has slowed in the 1970's
- Blacks constitute one-third of all Americans living below the poverty line and about four in 10 Black children are raised in poverty as against roughly one in 10 white children.

These statistics reflect the very basic and continuing nature of the problem which confronts all of us who are committed to the goal of equal employment opportunity. Patterns of discrimination against minorities are built into the fabric of our country's business operations. As one of the University of Wisconsin's own faculty members, Herbert Hill, has written, "Job Discrimination Does Not Occur In Isolated Pockets. Rather, These Pockets Reveal The Operation Of Racial Employment Patterns Which Can Be Broken Only By Sweeping Measures."

As all of us familiar with employment discrimination problems know, vigorous litigation is often necessary to force the adoption of such sweeping remedial measures. We also understand that not every employer can or should be sued to insure an end to job bias. Rather, voluntary compliance and affirmative action represent important corrective mechanisms in the overall effort to eradicate discriminatory policies. I have been asked specifically to address the future of affirmative action under federal law.

The Supreme Court has not ruled on the Bakke case. Of course, I am, along with everyone else who is dedicated to affirmative action and equal employment opportunity, deeply concerned about the final decision in that case. But my reason for being apprehensive about the future of affirmative action arises not out of Bakke, which is yet to be decided, but because of several recently decided or initiated controversies which pose serious threats to voluntary efforts to deal with our lingering legacy of racial discrimination. In the first, Weber v. Kaiser Aluminum and Chemical Corporation, decided late last year, the Fifth Circuit upheld a district court's determination that an affirmative action plan included in Kaiser's collective bargaining agreement with the United Steel Workers violated provisions of Title VII prohibiting racial classifications and preferential treatment. The program established a long term goal of 30 percent minority participation in craft positions at Kaiser's Plant in Gramercy, Louisiana based on the composition of the available work force in the area. It was to be achieved by selecting one qualified minority or female employee to fill an on-the-job training vacancy for each white male employee so selected.

Prior to the affirmative action program, craft jobs were filled by hiring fully trained journeymen from outside the plant. Only five minority persons out of 290 had ever been employed by Kaiser at the Gramercy Plant in the craft positions involved. The program at this plant was part of a national program adopted by Kaiser and The Steelworkers, initiated in part in order to comply with Executive Order 11246. As you know, that order requires federal contractors to evaluate their workforces

for under utilization of minorities and women and take affirmative action to correct any deficiencies found.

The panel decision of the Fifth Circuit upheld the district court's determination that the program violated the preferential treatment prohibitions of Title VII. The district court found that there had been no past discrimination against minorities at the Gramercy Plant and therefore a voluntary affirmative action plan was not warranted. The decision is a difficult one to distinguish. Employers who, either out of commitment or fear of the lost of federal contracts or a massive Title VII action, wish to take positive action to improve the minority composition of their workforces are in an obvious dilemma.

A broad reading of Weber suggests that numerical goals may not be adopted in the absence of an admission or finding of prior discrimination. If so read, the Weber decision could undermine the basis upon which consent decrees are routinely negotiated and approved by the courts without an adjudication, finding or admission of discrimination, thus removing the incentive for prompt settlement of Title VII actions. The decision also casts doubt on the entire executive order program. Voluntary compliance, the touchstone of Title VII, as the Fifth Circuit noted in United States v. Allegheny-Ludlum, would become, by that same court's ruling, difficult to achieve. Because the Carter Administration is committed to encouraging voluntary efforts to end discrimination in employment the United States moved to intervene in the Weber case and petitioned the Fifth Circuit for rehearing. We, together with Kaiser and the Steel

Workers, suggested that the rehearing be en banc. Though intervention was granted, we learned only a few days ago that our petition was denied.

Another action illustrates the problem. In a suit brought by the Police Benevolent Association of Hillsborough County, Florida against the City of Tampa, the plaintiff challenges actions of the city taken pursuant to a conciliation agreement with the EEOC. In May of 1976, the city and EEOC entered into a conciliation agreement after a number of complaints had been filed alleging employment discrimination by Tampa against women and minorities in several city departments. The agreement provided for back pay, changes in recruitment and job notification, modification and validation of employee selection procedures which had an adverse impact, and long and short term goals for the hiring and promotion of Blacks and women. The city, consistent with the agreement and its newly revised civil service regulations, promoted some 14 police officers to the rank of Sergeant, three of whom were Blacks who had passed the Sergeant's examination.

The Police Benevolent Association's complaint alleges discrimination against white police officers and violation of its collective bargaining agreement with the city. The Association's petition for a temporary restraining order to prevent promotions under the revised merit system was denied and a motion for preliminary injunction is now pending before the district court. We have recently intervened along with the EEOC to oppose the motion.

As is usually the case, there was no admission of liability by the City of Tampa in the conciliation agreement. Nevertheless, we believe the facts will show that there was past discrimination by Tampa. A strong statistical case can be made by showing the under-utilization of minorities and women in various job classifications as compared to their numbers in the relevant labor market. In addition, the city maintained an unvalidated height and weight requirement for police and utilized unvalidated examinations that had an adverse impact upon minorities for other city jobs. We feel obliged to develop this information for the court in order to sustain the conciliation agreement.

In yet another recently decided case, Detroit Police Officers Ass'n, et al. v. Young, et al., a district court on February 27, 1978, found that an effort by the Detroit Police Department to increase its minority representation was unlawful under Title VII and the Fourteenth Amendment. The facts of that case differed substantially from the facts in Weber and Tampa, however. The court there found not only an absence of discrimination by Detroit since the effective date of Title VII as amended to reach governmental entities in 1972, but, on the contrary, very substantial efforts by the city to employ qualified Blacks on its force. Additionally, the court found that the examinations for the Sergeant's position in question were valid and had little or no adverse impact. Other screening devices used by Detroit were found to have no adverse impact on Blacks; indeed, in several instances they seemed to have had a slight adverse impact upon whites, according to the findings of the court. Thus, Detroit's decision to promote Sergeants from--in effect--separate white and Black lists, came under attack and was found to violate federal and state antidiscrimination statutes as well as the Fourteenth

Amendment. We are presently considering whether federal amicus participation in the Detroit case at the Appellate level would be appropriate. Since our analysis has not been completed, I hope you will understand my remarks on this case to be tentative and not directed toward the merits.

On the federal level, one program that has come under concerted attack is the minority business enterprise provision of the Public Works Employment Act of 1977, which sets aside 10 percent of funds provided under the statute for minority owned businesses. It was designed to help overcome the prior exclusion of minority businesses from meaningful participation in the construction industry, and to ensure that minority owned businesses would have the opportunity to share in the funds distributed under the Act. Such an arrangement would increase the likelihood that minority firms would be able to gain a firmer hold in the market place thereby lessening the need for assistance programs in the future and that greater opportunities would be made available for employment of minority workers.

This provision was added on the floors of the House and the Senate by Representative Parren Mitchell and Senator Edward Brooke, respectively. It requires prime contractors to use their best efforts to employ qualified bona fide minority owned subcontractors and suppliers on government assisted projects funded under the Act. Pursuant to regulations and guidelines interpreting the statute, a waiver or downward adjustment of the 10 percent goal is to be granted where qualified minority businesses are shown to be unavailable.

Twenty seven lawsuits have challenged the set aside as unconstitutional racial discrimination against non-minority contractors, most of which were brought by local affiliates of the Associated General Contractors of America. To date, three district courts have held the provision to be constitutional; one court has held it unconstitutional as applied and one court has held it unconstitutional on its face, this latter having been appealed to the Supreme Court. All other courts have refused to enjoin the program preliminarily on the ground that the provision is probably constitutional and/or an injunction would not be in the public interest. The Third Circuit recently upheld the denial of a preliminary injunction, noting that the plaintiffs had not presented a strong likelihood of success on the merits.

I don't want to go into a detailed explanation of the legal arguments presented by the Civil Rights Division in defense of this provision, but basically, we have contended that minority sensitive affirmative action legislation to remedy prior discrimination and ensure against minority exclusion from federally financed state and local government programs is well within congressional authority pursuant to its powers under the spending clause, the Fourteenth Amendment and the Fifth Amendment.

The facts show that minorities comprise approximately 17 percent of the population yet control only about 4 percent of the business in this country and that minority firms earn only 1.1 percent of the

gross industry receipts. It has been estimated that minority firms have been awarded substantially less than 1 percent of federal contracts. This brief sketch of the history of minority business exclusion from the largesse of government contracts and industry profits, standing alone, provides strong justification for congressional action under the PWE Act.

The more pertinent question is, of course, whether the set aside is the proper remedy to correct this prior exclusion and ensure against its recurrence.

Many alternative approaches to assist minority business have been tried in the past and have failed to achieve the desired result. These alternative approaches have failed primarily because they speak in terms of "fostering" minority business or simply "using best efforts" to utilize minority subcontractors or supplies without setting any recognizable goal.

The provision thus takes the form of a minority business participation requirement because of these past failures and because no alternative training, tax incentive or loan program would have prevented the short term exclusion of minorities from participation in the benefits of the PWE Program; the need was for a provision which would take effect immediately in conjunction with the imminent distribution of funds. For this reason, the 10 percent provision is particularly appropriate to an affirmative action program in the context of emergency economic stimulus legislation.

Other arguments in favor of the provision are:

1. The provision applies to only one set of grants for one year;

2. The intent of the provision is to lessen the need for future programs of this type;

3. Non-minority firms would obtain approximately 90 percent of grant funds in any case;

4. The 10 percent goal is flexible and may either be waived or adjusted downward in appropriate cases.

This defense of the provision was painstakingly developed by attorneys in the Civil Rights Division. Since there was little legislative history concerning the need for the provision, it was necessary for us to develop a factual setting that demonstrated the prior exclusion of minority businesses from the benefits of government contracts and the industry in general.

Our experience defending the minority set aside provision has impressed us with the need for a careful approach to the implementation of affirmative action or minority sensitive programs. We are now in the process of giving other federal agencies and departments the benefit of our thinking in this regard.

In a recent cabinet memorandum, the Attorney General cautioned the heads of Federal Executive Agencies to tailor affirmative action programs carefully to meet their legitimate objectives. The Attorney General's position in that memorandum is consistent with that enunciated

in the government's brief in the Bakke case: That is, that minority sensitive programs may be employed where they are necessary as a remedy for unlawful discrimination, as prophylactic programs to prevent racially disadvantageous outcomes, or as a means of remedying the lingering effects of past public or private discrimination. He advised that such programs be established and administered with this legal standard in mind and that where possible, legislative history and departmental justifications for the programs reflect information as to the need for the program, its objectives and the lack of suitable alternatives.

The Weber, Tampa, and Detroit cases make painfully clear that state and local governments as well as private industry can benefit from similar advice. As those developments demonstrate, affirmative action, voluntary action is presently under vigorous attack. We fought for years to get employers to face up to the task of ending present discrimination and remedying the effects of past discrimination. Now we must fight to ensure that employers willing to acknowledge this duty, before they are sued are not forced by baseless charges of "reverse discrimination" to back off. The cruel irony of this situation should not escape any of you. But the achievement of the goal of equal employment opportunity has always required a lot of time and energy. I don't know if there ever was a time when a Title VII lawyer could walk into court, tell the judge what the law ought to be, and walk out with a complete victory. Given the recent trends in the law, however, we need to devote even more time and more energy than ever before. Our actions should be measured and deliberate. But above

all else, they should be bold, bold enough to insure that all our citizens will soon share in the promise of equal employment opportunity, or we can meet in Madison in 1990.

Thank you.